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No. 87-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

RED LAKE BAND OF CHIPPEWA INDIANS, et al.
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1) Whether federal courts should have referred to tribal court for resolution a suit by the United States against an Indian tribe seeking to enforce a federal records law?

2) Whether an Indian reservation court, organized and funded pursuant to 25 C.F.R. Part 11, but enforcing a tribal law and order code, is an arm of the tribe, making its records tribal records, or an arm of the federal government, making its records federal records?

3) Whether an Indian tribe enjoys sovereign immunity from suit brought by the United States government?

PARTIES TO THE PROCEEDING SOUGHT TO BE REVIEWED

United States of America

Red Lake Band of Chippewa Indians

Red Lake Tribal Council and its members:

Roger Jourdin, Chairman

Royce Graves, Secretary

James Strong, Treasurer

Allen English, District Representative

Lawerence Bedeau, District Representative

George Jones, District Representative

Adolph Barrett, District Representative

Roman Stately, Jr., District Representative

Gerald Brun, District Representative

Dan Raincloud, Jr., District Representative

Tom Stillday, District Representative

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UNITED STATES OF AMERICA,
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PETITION FOR A WRIT CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Red Lake Band of the Chippewa Indians hereby petitions this Court for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit to review the appeal court's decision in the case of *United States of America v. Red Lake Band of Chippewa Indians*, No. 86-5453 MN.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit of which review is sought is reported at 827 F.2d 380 (1987). The Opinion is reproduced in

the Appendix at App. 2. The district court opinion affirmed by the Eighth Circuit is reproduced at App. 10.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit is dated August 31, 1987. A timely petition for rehearing was filed by the Red Lake Band of Chippewa Indians. That petition was denied on September 28, 1987. App. 1. This Court has jurisdiction to review the judgment below pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

This case involves a consideration of the primary jurisdiction of tribal courts, the doctrine of sovereign immunity, and the rights of self-government enjoyed by Indian tribes of the United States. The case also requires consideration of the Federal Records Act, 44 U.S.C. § 3106, 3301, and certain regulations of the Bureau of Indian Affairs, 25 C.F.R. Part 11. *See* App. 24 and App. 26.

STATEMENT OF THE CASE

The Red Lake Band of Chippewa Indians (hereinafter either the Red Lakes or the Tribe) is a federally-recognized Indian tribe. The Tribe signed treaties of peace with the United States in 1863, 13 Stat. 667, and 1864, 13 Stat. 689; (compiled in II Kappler, *Indian Affairs, Laws and Treaties*, (1904) at 853-855, 861-862). The Red Lakes live on the Red Lake Reservation which covers approximately 637,000 acres of Northern Minnesota.

The Tribe operates as a sovereign government pursuant to a Constitution ratified by the Tribe's members and approved by the Secretary of the Interior on November 10, 1958. That Constitution, among other things, grants the Tribal Council authority "to enact ordinances . . . provid-

ing for the maintenance of law and order and the administration of justice by establishing a police force and a tribal court and defining their powers and duties . . . ." Revised Constitution and By-Laws of the Red Lake Band of Chippewa Indians, Art. VI, 5.

As early as February 15, 1952, the Secretary of the Interior approved a tribal law and order code establishing the criminal rules of conduct for the Red Lake Reservation. *See*, Exhibit F, Supplemental Court of Appeals Record. In subsequent amendments through the years, the Tribe established rules of criminal procedure for the reservation court that enforces that law and order code and continued to update the code's definition of offenses, as necessary. In light of the successful operation of a justice system on the Red Lake Reservation, Congress explicitly exempted that Reservation from operation of P.L. 83-280 when it granted the State of Minnesota criminal jurisdiction over all other Indian reservations in that state. 28 U.S.C. § 1152(a). *See, Bryan v. Itasca County*, 426 U.S. 373, 385 (1976).

In the 19th Century the Bureau of Indian Affairs began to establish courts on certain Indian reservations, typically called Courts of Indian Offenses, to handle prosecutions against on-reservation criminal activity by Indians. *See* generally, Felix S. Cohen's *Handbook of Federal Indian Law*, (1982 Edition, R. Strickland, ed.) at 332-335. These courts are often known as CFR courts, for the rules establishing them are now codified in 25 C.F.R. Part 11. Those rules set up the procedures whereby judges of the courts are appointed and by which court proceedings are conducted. Judges, for instance, are appointed by the Bureau of Indian Affairs, and paid by the Bureau of Indian Affairs (BIA), but are subject to the approval or veto of the Reservation Tribal Council. 25 CFR § 11.3. The rules also define the elements of the

criminal offenses alleged violations of which are prosecuted before the courts. 25 CFR §§ 11.38-11.98ME.

At the time the controversy involved in this case arose, the court on the Red Lake Reservation was funded and organized through the CFR mechanism. On the other hand, the Red Lake Court did not enforce the CFR list of offenses. Instead, it enforced -- and still enforces -- criminal ordinances enacted by the Tribe itself.[1]

On August 29, 1985, the Red Lake Tribal Council passed an ordinance declaring that "all Red Lake Court of Indian Offenses case records shall be kept confidential by the Court and the information contained in the case records shall be withheld from public disclosure." Red Lake Tribal Council Ordinance #1-85. On the same date, through Resolution No. 234-85, the Tribal Council ordered that the case records of all closed cases of the Red Lake Court be transferred to the Tribal archives and kept confidential. The records were accordingly transferred on August 30, 1985.[2]

On September 17, 1985 the BIA demanded by letter to the Tribal Council that it relinquish the records of all closed cases of the Red Lake Court. When the records were not released, the United States brought an action in

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1 The Red Lake court is now funded through a grant under P.L. 93-638, 41 U.S.C. § 252(c), rather than through the CFR mechanism.

2 The Tribal Council action was taken in response to a concern that the records would be made available by the BIA to a non-Indian, non-reservation newspaper that had filed an FOIA request with the BIA for the records. The FOIA, of course, does not apply to Indian Tribes. As self-governing societies they reserve the right to handle their governmental documents as they themselves determine. *See*, 5 U.S.C. §§ 551(h), 552.

the United States district court for the district of Minnesota for recovery of the records pursuant to 44 U.S.C. §§ 3106 and 3301, the Federal Records Act.

On cross motions for summary judgment, the district court ruled in favor of the government and ordered release of the records. The district court rejected the Tribe's assertion that its sovereign immunity protected it from suit by the federal government absent an explicit Congressional authorization. The district court also held that the records at issue were records of the United States and that their deposit into Red Lake archives and the Tribe's refusal to reveal them constituted a violation of 44 U.S.C. § 3106. The court then directed that the records be turned over to the BIA, but stayed its own order pending appeal to the Eighth Circuit court of appeals. On appeal, the court of appeals generally affirmed the district court's ruling.

The Tribe also argued before the district court that summary judgment should not be granted because there remained a genuine dispute of fact as to the nature of the Red Lake Band's organizational structure and thus, the nature of the Red Lake Court. The district court determined that there was no genuine dispute and ruled on the motions for summary judgment.[3] The Tribe before this Court does not reassert the existence of a genuine dispute. The nature of the Red Lake Court is at issue, but the resolution of that issue involves a legal determination that can be made on the facts in the record.

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3 The Tribe's cross-motion for summary judgment was filed in an effort to protect its interests if the district court determined, as it ultimately did, that there was no genuine factual dispute.

THE COURT OF APPEALS DECISION

In ruling on the Red Lake's appeal from the district court's judgment, the court of appeals considered the Tribe's two primary arguments. Those were: (1) the Tribe is exempt from suit under the doctrine of sovereign immunity and (2) the Red Lake Court is, in substance, a tribal court, functioning as an exercise of tribal sovereignty and its records, therefore, are tribal, not BIA, records.

With respect to the Tribe's assertion of sovereign immunity, the court of appeals acknowledged the general rule that tribes are protected from suit unless there is an explicit waiver of that immunity by Congress. But the court went on to hold, relying on two Ninth Circuit cases, *United States v. White Mountain Apache Tribe*, 784 F.2d 917 (9th Cir. 1986) and *United States v. Yakima Tribal Court*, 806 F.2d 853, 861 (9th Cir. 1986), *cert. denied* ___ U.S. _____, 107 S. Ct. 2461 (1987), that the Tribe's sovereign immunity does not foreclose lawsuits brought by the United States. The court so ruled on essentially two grounds. First, it said that "it is an inherent implication of the superior power exercised by the United States over the Indian tribes that a tribe may not interpose its sovereign immunity against the United States." 827 F.2d at 382. It concluded this loss of sovereign immunity was a "necessary implication of [the Indians'] . . . dependant status," citing *Washington v. Confederated Tribes of Colville*, 447 U.S. 134, 152 (1980), and arose even without Congressional action. Second, the court announced that for purposes of this case, tribes were analogous to states. Having so concluded, the court then relied on the case of *United States v. Mississippi*, 380 U.S. 128 (1965), to hold that "just as a state may not assert sovereign immunity as against the federal

government . . . neither may an Indian tribe . . . ." 827 F.2d at 383.

With respect to the Red Lake's second main argument (that the records of the Red Lake Court were tribal records) the Eighth Circuit held, without analysis, that as the records were those of a "CFR court," the documents were, *ipso facto*, BIA records. In so holding, the court relied upon its interpretation of Department of the Interior regulations, 25 C.F.R. Part 11, but did not look past those regulations to the Red Lake Court's "ultimate source of . . . power." *United States v. Wheeler*, 435 U.S. 313, 320 (1978). The court went on to consider whether, pursuant to the regulations, a tribe utilizing the CFR-funding mechanism could nevertheless exempt itself from certain of the regulations, including those related to record-keeping. On this point, the court decided that a tribe "organized" under the Indian Reorganization Act, 25 U.S.C. § 461 et seq., which uses "CFR courts", can exempt the court from the bulk of the CFR regulations and make it an "independent tribal court" by enacting a tribal law and order code. 827 F.2d at 382. On the other hand, the court said, if a federally-recognized tribe that has not "organized" itself under the IRA uses a CFR court, it cannot similarly exempt itself from the CFR rules by enacting a law-and-order code. The court of appeals then held that the Red Lake Band had not presented evidence that it met the criteria for "exemption," for it had not shown it was "organized" under the IRA.

REASONS FOR GRANTING THE WRIT

This Court has repeatedly noted that "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142

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(1980) quoting *United States v. Mazurie*, 419 U.S. 544, 557 (1975). The Court has also consistently interpreted federal law in a manner most likely to aid in achieving the federal government's "goal of promoting tribal self-government, a goal embodied in numerous federal statutes [fn. omitted]." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983). The Court has reiterated that any restrictions on that right should generally be found only where there is a clear and unequivocal announcement by Congress of the intent to do so. *See e.g. Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59 (1978); *Bryan v. Itasca County, supra* 426 U.S. at 392-393.

In this case, the Eighth Circuit has ignored these basic tenets of federal Indian law. On the question of sovereign immunity, the court of appeals found a loss of this fundamental component of Indian sovereignty in the absence of explicit Congressional action. Such an implied divestiture of right is neither justified as a matter of law nor necessary as a matter of policy. The net effect is to permit a central element of tribal sovereignty to be lost at the whim of executive branch officers simply by their decision to file a lawsuit. Next, judging the nature of the Red Lake Court and its records, the Eighth Circuit focused on form rather than the substance, contrary to this Court's direction in *United States v. Wheeler, supra*. In so doing, and in declaring, against all logic, that a court enforcing tribal law is not a tribal court, the Eighth Circuit cut deeply into the Red Lake Band's sovereign authority "to make . . . [its] own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220 (1959). And finally, the court of appeals overlooked this Court's recent affirmations of the primary importance of tribal courts in protecting tribal self-government. *Iowa Mutual Insurance Co. v. LaPlante*, ___ U.S. ___, 107 S. Ct. 971 (1987), *National Farmer's Union Ins. Cos. v.*

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Crow Tribe, 471 U.S. 845 (1985). It thus permitted the exercise of federal court jurisdiction over a controversy that should first has been referred to the tribal court itself.

In *United States v. Wheeler*, *supra*, this Court reserved the question of "[w]hether . . . a [CFR] court is an arm of the federal government or, like the Navajo Tribal Court, derives its powers from the inherent sovereignty of the Tribe." 435 U.S. at 427 n. 26. That question, and the implications of its answer, are squarely presented here. The Eighth Circuit answered it in a way contrary to the clear direction of this Court's rulings on tribal sovereignty and self-government. Though this case involves but one court on one reservation, it necessarily implicates all CFR courts throughout the country and raises decidedly important questions of federal Indian law which should be settled by this court. *See* Rule 17.1(c), S. Ct. Rules.

1. The District Court and Court Of Appeals Should Have Referred This Controversy To Tribal Court

The district court and court or appeals committed a fundamental error when they heard this case. They should, instead, have referred the controversy to tribal court for resolution. In two recent cases, this Court has made clear that controversies between Indians and non-Indians involving reservation affairs should be resolved, in the first instance at least, in the reservation court. *See, National Farmers Union Ins. Cos. v. Crow Tribe, supra*, and *Iowa Mutual Insurance Co. v. La Plante, supra*. In each case, the Court directed that the federal court stay its review of tribal court jurisdictional issues until the tribal court had determined to accept or reject its own jurisdiction over the matter. Here, although the issues

to be decided are not jurisdictional in the same sense, the same deference to tribal court decisions should nevertheless prevail. Otherwise, the "exercise of jurisdiction [by a federal court] over matters relating to reservation affairs can . . . impair the authority of tribal courts," *Iowa Mutual, supra*, 107 S. Ct. at 976. If the Red Lake Band is subject to suit at all, a matter discussed below, it should, at least, only be so in its own tribal court.

The lower courts -- including the Eighth Circuit -- have so understood the broad teaching of *National Farmers Union* and *Iowa Mutual*: tribal courts, not federal courts, should resolve controversies arising on a reservation. *See, United States ex rel. Kishell v. Turtle Mountain Housing Authority*, 816 F.2d 1273 (8th Cir. 1987) (suit by Indian against non-Indian corporation should be brought in tribal court, not U.S. District Court); *Wellman v. Chevron, U.S.A.*, 815 F.2d 577 (9th Cir. 1987) (same). When a non-Indian sues an Indian for activities occurring on the reservation, the cause of action should be heard in tribal court. *Federal Land Bank of Omaha, v. Reeves*, ____ F. Supp. ____, 14 ILR 3071 (D.S.D. 1987). *See* also, *R.J. Williams v. Fort Belknap Housing Authority*, 719 F.2d 979 (9th Cir. 1983) ("the tribal court is generally the exclusive forum for the adjudication of disputes affecting the interests of both Indians and non-Indians which arise on the reservation.")[4] It makes no difference that the plaintiff is the United

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4 Interestingly, the rules that the United States says govern the Red Lake Court expressly grant the court jurisdiction over "all suits wherein the defendant is a member of the tribe . . . within [its] jurisdiction . . . ." 25 C.F.R. § 11.22. Here, individual tribal council members were named as additional defendants. Thus, the federal government's own regulations lead to the conclusion the Tribe urges here.

States itself. Suits by the United States are typically subject to the federal doctrine of abstention, to which the Court has analogized deference to tribal courts. *See, Leiter Minerals v. United States,* 352 U.S. 220 (1957); *United States v. Ohio*, 614 F.2d 101 (6th Cir. 1979). It is, moreover, United States policy to encourage the development of tribal self-government in which "tribal courts play a vital role . . . ." *Iowa Mutual, supra*, 107 S. Ct. at 976.

The federal courts in this case should have dismissed the case or stayed action on the complaint so that the issues could be presented first for tribal court review.[5]

2. The Court of Appeals Applied An Improper Standard In Determining That The Red Lake Court Records Were BIA Records Rather Than Records Of The Tribe

The court of appeals had before it the question whether the records of the Red Lake Court are records of a federal agency or of a separate sovereign, that is, the Red Lake Band of Chippewa Indians. To answer that question, the court should necessarily have grappled with the question left open in *United States v. Wheeler, supra*: Whether a court funded and generally organized

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5 This quasi-jurisdictional issue was not raised below. That does not deny this Court the power to consider it. This Court may review "fundamental errors" by lower courts, even if not previously asserted by a party. *See, Sibbach v. Wilson & Co.*, 312 U.S. 1, 16 (1941); *Kessler v. Strecker*, 307 U.S. 22, 34 (1939). As well, this Court has drawn an analogy between the deference to tribal courts announced in *National Farmers Union, supra,* and *Iowa Mutual, supra,* and the more traditional abstention doctrine. *See, Iowa Mutual Insurance Co. v. LaPlante, supra*, 107 S. Ct. at 976 n. 8. This Court may, *sua sponte*, raise and resolve abstention issues not raised below. *Bellotti v. Baird*, 428 U.S. 132, 143, n. 10 (1976).

under the Code of Federal Regulations, but which enforces tribal law, acts as an arm of the federal government or as an arm of the separate tribal sovereignty.

But, in answering this question, the Eighth Circuit simply announced, without analysis, that "the records of C.F.R. courts are agency records and belong to the United States." 827 F.2d at 383. The court noted that the Red Lake Band is listed in the regulations as one of those tribes to whom the regulations generally apply, 25 C.F.R. § 11.1(a)(6), and concluded that "designated tribal courts are presumptively CFR courts". 827 F.2d at 383.[6]

The teaching of this Court in *United States v. Wheeler, supra*, however, makes it clear that such a superficial analysis cannot satisfactorily fix the underlying status of a tribal court. In that case, too, the question of double jeopardy turned on whether a tribal court, there a court organized by the Navajo Tribe, was an "arm of the federal government." 435 U.S. at 319. In making that judgment, the Court noted that the critical issue is "not the extent of control exercised by one prosecuting authority over the other, but rather the *ultimate source of the power* under which the respective prosecutions were undertaken." 435 U.S. at 320. (emphasis added) "That Congress has in certain ways regulated the manner and

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6 Having so quickly decided the nature of the records at issue, the only question the court analyzed at all was whether the Redlake Band had exempted itself from the full reach of the regulations (including record keeping) by showing that (1) it was organized under the Indian Reorganization Act, 25 U.S.C. §. 461 et seq. and (2) it had adopted a tribal law and order code. *See* 25 C.F.R. §. 11.4(d). A regulatory exemption is beside the point, however, if the records are not the BIA's to regulate. In any case, the Redlake Band has clearly followed the record keeping requirements of the regulations themselves. *See* n.9, *infra*.

extent of the tribal power of self-government does not mean that Congress is the source of that power." *Id.* *See also, Talton v. Mayes*, 163 U.S. 376, 384 (1896).[7]

The Red Lake Court, even though its judges are paid by the BIA, nevertheless does not enforce *federal law*. It enforces a criminal code adopted by the Tribe itself. The "ultimate source" of the Red Lake Court's power is the sovereign power of the Red Lake Band of Chippewa Indians, "a separate people . . . regulating their internal and social relations." *United States v. Kagama*, 118 U.S. 375, 381-382 (1886), quoted in *United States v. Wheeler, supra*, 435 U.S. at 322, and the Red Lake court acts as an arm of the Red Lake Band.[8] Were it otherwise, then

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7 The Eighth Circuit in this case had before it several pronouncements and letters from the Tribe itself asserting that the Red Lake Court was a "CFR Court," not a tribal court. Those declarations came in the context of a struggle over BIA funding of court operations. What the Tribe or its representative may have said about the nature of the Red Lake Court, in any case, is not determinative of the legal issue involved here. For purposes of funding, the Red Lake Court was a CFR court. That does not mean that when it enforces tribal law it is not an "arm of the Tribe."

8 In this case, the Red Lake's do not urge, and this Court need not reach if it accepts certiorari, the question of whether a *CFR court* enforcing *CFR offenses* is operating as an arm of the federal government or of the Tribe itself. It is worth noting, however, that if the CFR Courts do not represent an exercise of tribal sovereignty, then not only are subsequent federal prosecutions barred, but the legality of the CFR courts may be in question. The Interior Department Solicitor has suggested, for instance, that the "more satisfactory defense" of the legality of the CFR courts "is a doctrine . . . that the courts of Indian offenses derived their authority from the Tribe rather than from Washington." Op. Sol. Int. October 25, 1934 (Powers of Indian Tribes) 55 I.D. 14, reprinted in, 1 Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs 1917-1974, (Cont.)

prosecution in a CFR court enforcing tribal law, where punishments cannot exceed one year in jail, 25 U.S.C. § 1302(7), as amended by § 4217, P.L. 99-570, would foreclose later federal prosecutions where more severe sentences can be meted out, with predictable "undesirable consequences." *United States v. Wheeler, supra* 435 U.S. at 330.[9]

(n. 8 cont.)

at 445, 476. This more "satisfactory defense" is necessary because the Secretary has relied on 25 U.S.C. § 2 to provide authority to establish CFR courts to try persons for the violation of criminal offenses defined in the administrative regulations. There is reason to question the breadth of that authority. *E.g., Organized Village of Kake v. Egan*, 369 U.S. 60, 63 (1962) (declaring that 25 U.S.C. § 2 and § 9 do not provide "general power to make rules governing Indian conduct.") *But see United States v. Clapox*, 35 F. 575 (D. Or. 1888) (upholding legality of BIA courts).

9 The regulations themselves do not require the full records of the tribal court be made agency records or that they be turned over to the agency. If the records are not federal agency records, therefore, the regulations themselves do not compel a result favorable to the government. 25 C.F.R. § 11.11 requires, first, that a case record be kept available "for inspection by duly qualified officials . . . ." But the record need simply summarize the case and need not be released, simply available for review. 25 C.F.R. § 11.11 also requires that "a record of all proceedings shall be kept at the BIA agency office as required by 25 U.S.C. § 200." That law provides that "whenever an Indian shall be incarcerated in an Indian jail, or any other place of confinement, on an Indian reservation or in an Indian school, a report or record of the offense or case shall be immediately submitted to the superintendent of the reservation or such official or officials as he may designate and such reports shall be made part of the records of the agency office." The Red Lake Court does submit such a summary report whenever an Indian is incarcerated. *See* Page 24a of Addendum to Court of Appeals Opening Brief for (cont.)

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Subjected to the *Wheeler* analysis, the inapplicability of the Federal Records Act to this case becomes manifest. 44 U.S.C. § 3301 defines federal records to include materials "made or received by an agency of the United States under federal law or in connection with a transaction of public business . . . ." When it is enforcing the tribal law and order code, the Red Lake Court is not making or receiving documents "under federal law". It is making or receiving those documents under tribal law. Nor can it be said that it is transacting the "public business" of the United States government. It is, rather, conducting the business of a separate sovereign, the Red Lake Band of Chippewa Indians. Thus, the records of the Red Lake Court are tribal records, not subject to the control of the BIA, irrespective of the BIA's funding or administrative regulation of the Red Lake Court.

3. The Red Lake Band Of Chippewa Indians Is Immune From Suit

The separate and sovereign nature of American Indian tribes was first enunciated by Chief Justice Marshall in *Worcester v. Georgia*, 31 U.S. 515 (1832). Although the Supreme Court has departed from the "conceptual clarity of Mr. Chief Justice Marshall's view in *Worcester*," *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973), the Court still hews to the determination that "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory." *White Mountain Apache Tribe v.*

(n. 9 cont.)

Appellants (December 31, 1986). What the Tribe seeks to protect are the detailed and complete court records -- such as hearing transcripts, etc.

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Bracker, supra, 448 U.S. at 142, quoting *United States v. Mazurie,* 419 U.S. 544, 557 (1975). "[U]ntil Congress acts the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their independent status." *United States v. Wheeler, supra,* 435 U.S. at 323.

A fundamental element of tribal sovereignty is immunity from lawsuits absent Congressional authorization. *United States v. United States Fidelity Guarantee Company,* 309 U.S. 506, 513 (1940). That "immunity cannot be waived by [government] officials." *Id.* "[A] waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed [by Congress].'" *Santa Clara Pueblo v. Martinez, supra,* 436 U.S. at 58 quoting *United States v. Testan,* 424 U.S. 392, 399 (1976), quoting *United States v. King,* 395 U.S. 1, 4 (1969).

The court of appeals acknowledged the clear statements by this Court upholding the sovereign immunity of American Indian tribes from suit. Relying, however, on two Ninth Circuit cases, *United States v. White Mountain Apache Tribe,* 794 F.2d 917, 920 (9th Cir. 1986) and *United States v. Yakima Tribal Court,* 806 F.2d 853, 861 (9th Cir. 1986) *cert. denied* ____ U.S. ____, 107 S. Ct. 2461 (1987), the court held nonetheless that a tribe's sovereign immunity did not protect it from suits by the United States, even without an explicit Congressional authorization. In so doing, the court of appeals misread this Court's precedents on tribal sovereignty and imported into federal Indian law inapplicable principles involving the sovereign powers of states of the Union.

The Eighth Circuit suggests that tribes have lost their sovereign immunity vis-a-vis the United States as "an inherent implication of the superior power exercised by the United States over the Indian tribes . . . ." 827 F.2d

at 381. In doing so the Court relied on this court's declaration in *Washington v. Confederated Tribes of Colville, supra*, that Indian tribes retain attributes of sovereignty unless they are divested by treaty, federal law, or "by necessary implication of their dependent status." *Id.*, 447 U.S. at 152 (citation omitted).

The Eighth Circuit has misunderstood this Court's analysis of the "necessary" restrictions on tribal sovereignty. As the Court explained it in *United States v. Wheeler, supra*, "[t]he areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and non-members of the Tribe." 435 U.S. at 326. Significantly, however, whatever other attributes of sovereignty are restricted when tribes deal with non-members, immunity from suit is not one of them. In fact, it is typically suits by non-members from which tribes *are* immune. *United States v. United States Fidelity Guarantee, supra.*

In any case, this lawsuit does not involve relations of the sort between a tribe and non-members explained by *Wheeler* and involved in, for instance, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). Rather, the issue here involves the nature of the relationship between the Tribe and the United States government itself. That relationship is defined by the treaties between the two sovereigns and by the inherent trust relationship arising as a consequence. In that context, the words of Chief Justice Marshall still hold meaning: "A weak state [such as an Indian tribe] . . . may place itself under the protection of one more powerful without stripping itself of the right of government and *ceasing to be a state*." *Worcester v. Georgia, supra* 31 U.S. at 557 (emphasis added). Nothing in the treaties between the Red Lake Band and the United States evinces an intent by the

Tribe to relinquish its sovereign immunity. Ambiguities in an Indian treaty should be resolved in favor of the tribe. *See e.g., Washington v. Passenger Fishing Vessel Ass'n.*, 443 U.S. 658, 675-76 (1979); *Menominee Tribe v. United States*, 391 U.S. 404 (1968); *Jones v. Meehan*, 175 U.S. 1 (1899). *A fortiori*, "the proper inference from silence . . . is that the sovereign power . . . remains intact." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 149 n. 14 (1982).

Nor need a waiver of sovereign immunity against suits by the United States be implied to protect the government's interest. Congress can provide for such suits if it sees fit to do so. But under the Eighth Circuit's rule, Congress need never act. Under the Eighth Circuit's rule, the sovereign immunity of an Indian tribe can be waived by any officer of the United States government who has authority to file suit. This Court has acted in the past to protect Indian tribes from the exercise of that kind of administrative power, *see, United States v. United States Fidelity Guarantee, supra*, and should do so again.

The Eighth Circuit also erred in relying on cases from this Court permitting suits by the United States against individual states of the Union. From the very first, this Court has rejected the analogy between Indian tribes and individual states. *See e.g., Cherokee Nation v. Georgia*, 30 U.S. 1, 16, (1831); *United States v. Kagama, supra*, 118 U.S. at 381. Lower courts, including the Eighth Circuit itself, have also rejected attempts to compare Indian tribes to the states. *See Wounded Head v. Tribal Council of Oglala Sioux Tribe*, 507 F.2d 1079, 1081 (8th Cir. 1975); *Barta v. Oglala Sioux Tribe of Pine Ridge Reservation*, 259 F.2d 553, 556 (8th Cir. 1958) *cert. denied* 358 U.S. 932 (1959); *Native American Church v. Navajo Tribal Council*, 272 F.2d 131, 134 (10th Cir. 1959).

In the context of a waiver of sovereign immunity the difference between the Indian tribes and the states is particularly compelling. This Court has held that by entering the Union, the states consented to suit by the sovereign thus created. *See United States v. Texas*, 143 U.S. 621, 12 S. Ct. 488, 494 (1892); cf. *Chisholm v. Georgia*, 2 U.S. 419 (1793). *See generally,* Tribe, "Intergovernmental Immunities In Litigation, Taxation, and Regulation: Separation of Powers Issues In Controversies About Federalism," 89 Harv. L.R. 682 (1976). Tribes did not, in the same way, consent to become part of the larger Union. Neither they nor their members ratified a constitution which subjected them to suit by the federal sovereign. Instead, they signed treaties with the United States, retaining their status as "distinct independent political communities . . . [and] their original natural rights," except as they ceded them to the United States in treaty or as the United States Congress explicitly acts to limit them. *Worcester v. Georgia, supra*, 31 U.S. at 560.

The Eighth Circuit's reliance on *United States v. Mississippi*, 380 U.S. 128 (1965), a case involving explicit Congressional statutes intended to enforce the Fifteenth Amendment, is particularly inapposite in this context. *Cf. Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (Congress may, in enforcing the Fourteenth Amendment, override state's Eleventh Amendment immunity from suit.) Here, the Tribe does not argue that its sovereign immunity cannot be waived by an explicit statement of the Congress. All the Tribe asks is that the Court again make it clear that the Tribe's sovereign immunity is not waived by implication, cannot be waived by executive branch officials, and can only be removed by an "unequivocally expressed" statement of Congress. *Santa Clara Pueblo v. Martinez, supra*, 436 U.S. at 58.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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